

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

CASEY GWINN, CITY ATTORNEY
SVK:JAL

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 533-5800
FAX (619) 533-5856

October 7, 2003

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

SUCCESSFUL LITIGATION:
Southern California Underground Contractors, Inc.

The City of San Diego has received favorable decisions in three cases brought against it by Southern California Underground Contractors, Inc. [SOCAL].

- I. *Southern California Underground Contractors, Inc. v The City of San Diego* [SOCAL 3]
San Diego Superior Court Case No. GIC 768749; Court of Appeal,
Fourth District Case No. D039275; California Supreme Court Case No. S116658

On August 20, 2003, the California Supreme Court denied a Petition for Review filed by Plaintiff Southern California Underground Contractors, Inc. [SOCAL], seeking to overturn a decision of the Court of Appeal upholding the City Council's permanent debarment of SOCAL.

In May 2001, Council permanently debarred SOCAL, pursuant to the San Diego Municipal Code, for "corrupt practices involving the administration of a contract with the City." SOCAL filed a lawsuit in Superior Court challenging the debarment. SOCAL alleged the Council debarment hearing procedure violated due process, that the Council was biased, and that the Council acted beyond its authority under the Municipal Code. On October 9, 2001, the Superior Court ruled that the City did not violate SOCAL's due process rights and that SOCAL had not shown the Council was biased. However, the court found that the Council acted outside its authority under the Municipal Code in imposing a permanent debarment rather than the alternative three year debarment. The trial judge made this ruling based upon an interpretation of the Municipal Code, finding that the phrase "administration of a contract," within the permanent debarment provision, did not include contract "performance" issues, for which the three year debarment was applicable. The trial judge found that all of SOCAL's conduct, as specified in the Council's findings, amounted to performance issues, therefore only the three year debarment could be imposed.

SOCAL appealed the portion of the Superior Court ruling finding there was no due process violation and that the Council was not biased. The City appealed the portion of the ruling finding the permanent debarment was beyond the Council's authority. On May 6, 2003, the Fourth District Court of Appeal, in a published decision, upheld the Council's permanent debarment of SOCAL. The appellate court ruled that SOCAL's due process rights had not been violated by the procedures followed for the Council hearing, and that the Council was an unbiased tribunal. The appellate court further ruled that "administration of a contract" included management level decisions, and that the conduct of SOCAL, as specified in the Council's findings, could be attributed to SOCAL's management in performing its contracts with the City. The published appellate court decision specified:

SoCal's documented conduct exceeded mere unsatisfactory or improper performance of its contractual duties. Much of the conduct involved policy decisions and cost-cutting tactics that could inure only to the benefit of SoCal as an entity. SoCal's administration of its contracts with City involved supporting, condoning or participating in corrupt practices. The use of deception and falsification emanated from SoCal's role in managing and supervising its contracts. Such corrupt practices warranted the City Council, 'in the public interest for the City's protection,' to permanently debar SoCal.

The Supreme Court's denial of SOCAL's Petition for Review allows the appellate court decision to become the final decision in this case. SOCAL can no longer challenge its permanent debarment.

II. *Southern California Underground Contractors, Inc. v The City of San Diego* [SOCAL 2]
San Diego Superior Court Case No. GIC 754273

On September 26, 2003, the Honorable E. Mac Amos, Judge of the Superior Court, granted the City's motion for summary judgement, dismissing SOCAL's breach of contract claims against the City regarding seven contracts upon which SOCAL was the low bidder and that were pending at the time of SOCAL's debarment. SOCAL claimed the contracts had been entered prior to the debarment and were breached by the City when it refused to allow SOCAL to perform the contracts after the debarment. In its ruling, the court agreed with the City's assertions that the contracts had not been entered prior to the debarment, and that the City was entitled to a "good faith" defense because it was in the public interest to allow the City to suspend processing the contracts until a final determination of SOCAL's debarment was reached. SOCAL claimed damages of approximately \$10,000,000.

Previously, on August 25, 2003, SOCAL entered a voluntary dismissal, with prejudice, of its other five causes of action in this lawsuit. The dismissal eliminated \$49,000,000 in damages claims by SOCAL.

After its first debarment, in June 2000, SOCAL filed this lawsuit seeking approximately \$59,000,000 in damages allegedly related to its debarment. SOCAL's complaint alleged causes of action for "breach of contract," "intentional interference with contract," "intentional interference with prospective business advantage," "fraud," "negligent misrepresentation," and "defamation." A trial date was deferred until the appellate court could rule on the issues presented in *SOCAL 3*, above. In June, 2003, the City filed a motion for summary judgment seeking to have each of SOCAL's causes of action dismissed. The City's motion was based in part upon arguments that the appellate court decision in *SOCAL 3*, noted above, barred certain claims by SOCAL, and that statutory governmental immunities barred other claims. Prior to the hearing on the motion, SOCAL agreed to dismiss its causes of action for intentional interference with contract, intentional interference with prospective business advantage, fraud, negligent misrepresentation, and defamation.

As a result of the Superior Court's ruling and the voluntary dismissal, SOCAL's entire damages action against the City has now been dismissed.

The City also filed a cross-complaint against SOCAL, alleging "false claims" violations. The false claims allegations are essentially based upon SOCAL's conduct that resulted in its debarment. The trial date for the false claims cross-complaint is in early December, 2003.

III. *Southern California Underground Contractors, Inc. v The City of San Diego* [SOCAL 5]
San Diego Superior Court Case No. GIC 793675

On August 28, 2003, the Honorable Richard Haden, Judge of the Superior Court, returned a verdict in favor of the City, and against Plaintiff SOCAL, in a construction litigation lawsuit. SOCAL was seeking \$239,000 in damages for an alleged "changed condition" on a public works contract. The issues involved in this case arose prior to SOCAL's debarment and were separate and distinct from the debarment related issues of the other SOCAL cases.

In 1999, SOCAL and the City entered into a \$1,185,000 contract for the replacement of water and sewer pipes in the downtown East Village area. The pipes being replaced dated to the early 1900's. Shortly after excavation of the pipeline trenches began, SOCAL gave notice of what it considered to be a changed condition for encountering old concrete pavement under the asphalt street pavement. A contractor may be entitled to additional compensation if it encounters an unknown condition that is materially different from the conditions represented in the contract plans and specifications or that is unusual from the conditions typically encountered in the type of work being performed. SOCAL claimed the plans and specifications did not represent the presence of concrete and that it was incurring additional costs in excavating thru the concrete. Several months later, SOCAL claimed the thickness of the pavement, approximately twelve inches, was also a changed condition. When the City refused to pay, SOCAL filed suit for "breach of contract."

At trial, the City contended no changed condition existed because the plans and specifications did not represent a specific composition or thickness of the pavement, only

referring to "existing pavement," that the City standard drawings noted the potential for old concrete pavement to be under asphalt, and, in an area urbanized for over 80 years, it was not unusual to encounter either old concrete pavement under asphalt, or multiple layers of pavement with a thickness of twelve inches. The City also contended SOCAL waived any claim for a changed condition due to thickness of pavement because it failed to give notice it was claiming the alleged thickness, as opposed to concrete under asphalt, as a changed condition. The City further contended SOCAL waived any claim as to either composition or thickness of pavement because SOCAL failed to provide the cost documentation, required by the contract, within a reasonable time, and itemized as required. Finally, the City contended SOCAL failed to prove damages because its cost itemization was not created until three years after the work, SOCAL had no documentation to support the itemization, and the itemization was substantially refuted by the City Resident Engineer's logs.

After a four day trial, Judge Haden, sitting without a jury, ruled in the City's favor on every issue and entered a verdict in the City's favor. The judge specifically noted the positive appearance made by the Field Engineering staff who testified at trial. The City will seek to recover its litigation costs.

Senior Deputy City Attorney Sim von Kalinowski handled all of the above litigation.

Respectfully submitted,

CASEY GWINN, City Attorney
SVK:jal

RC-2003-26